No. 13685

In the United States Court of Appeals for the Ninth Circuit

H. F. SCHAUB, APPELLANT

v.

UNITED STATES OF AMERICA, APPELLEE

APPEAL FROM THE DISTRICT COURT FOR THE TERRITORY OF ALASKA—FIRST DIVISION

BRIEF FOR THE UNITED STATES

J. EDWARD WILLIAMS,
Acting Assistant Attorney General,
P. J. GILMORE, JR.,
United States Attorney,
Juneau, Alaska.
ROGER P. MARQUIS,
ELIZABETH DUDLEY,
Attorneys, Department of Justice,
Washington, D. C.

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CITATIONS

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OPINION BELOW

The opinion of the district court is reported at 103 F. Supp. 873 (R. 47–54).

JURISDICTION

This is an appeal from a judgment entered May 17, 1952, enjoining appellant from taking gravel or asserting any right to do so from a certain tract of land (R. 66–69). Notice of appeal was filed July 2, 1952 (R. 69). The jurisdiction of the district court was invoked by the United States under 28 U. S. C. sec. 1345. The jurisdiction of this Court is sought to be invoked under 28 U. S. C. sec. 1291.

QUESTIONS PRESENTED

1. Whether an area which had been developed as a gravel pit by the United States and was in its actual use and possession could be included in a location under the mining laws.

2. Whether under the statutes here involved, the 37.5 acre tract of land was validly withdrawn against operation of the mining laws before appellant staked a claim to a part of the area.

STATUTES INVOLVED

The Act of March 4, 1915, c. 144, 38 Stat. 1100, as amended, 16 U. S. C. 492, provides as follows:

> Hereafter the Secretary of Agriculture, under regulations to be prescribed by him, is authorized to permit the Navy Department to take from the national forests such earth, stone, and timber for the use of the Navy as may be compatible with the administration of the national forests for the purposes for which they are established, and also in the same manner to permit the taking of earth, stone, and timber from the national forests for the construction of Government railways and other Government works in Alaska. * * *

The Act of March 30, 1948, c. 162, 62 Stat. 100, 48 U. S. C. 341, provides as follows:

> The Secretary of Agriculture, in conformity with regulations prescribed by him, may permit the use and occupancy of national-forest lands in Alaska for purposes of residence, recreation, public convenience, education, industry, agriculture, and commerce, not incompatible with the best use and management of the national forests, for such periods as may be warranted but not exceeding thirty years and for such areas as may be necessary but not exceeding eighty acres, and after such permits have been issued and so long as they continue in full force and effect the lands therein described shall not be subject to location, entry, or appropriation, under the public land laws or mining laws, or to disposition under the mineral leasing laws.

STATEMENT

On October 3, 1951, the United States filed a complaint seeking an injunction and damages against the appellant, on the grounds that he was unlawfully claiming a right, and had posted a notice of such right, on a part of a tract of land of 37.5 acres belonging to the United States which previously had been reserved for use of the Bureau of Public Roads as a source of road building material.[1] The property is located in the Tongass National Forest, Revillagigedo Island, Alaska, located on and near Whipple Creek, about 11.5 miles north of the City of Ketchikan (R. 3–10). The background for this proceeding may be summarized as follows:

From 1934, at various times, until 1951, the Bureau of Public Roads and other agencies of the Government removed gravel from the Whipple Creek area for the general construction, extension, maintenance and repair of the North Tongass Highway and other roads in the area, a considerable amount of which was removed from the area claimed by appellant (R. 124–125, 128–130, 174–176, 188, 223–224, 260–261, 278–280). In 1935, the Regional Forester looked the area over with the idea of planning for recreational purposes, and in 1940 he set apart and appropriated as a public service site a tract of 91.13 acres of land, of which the 37.5 acres here involved and the area claimed by appellant were a part. The Civilian Conservation Corps improved the tract by brushing out trails, clearing underbrush, and cutting trails on each side

[1] Appellant's claim comprises 17.54 acres, more or less, and overlaps the Government's 37.5 acre tract (R. 59, 125). Appellant's Notice of Location of Placer Claim states that the claim is for twenty acres (R. 300–301).

of Whipple Creek, for use as a recreational area (R. 4, 126, 127, 154–155, 209–210, 270).

Between 1948 and December 1950, the Forest Service, through contractors, and the Bureau of Public Roads removed approximately 35,000 cubic yards of borrow fill, sand and gravel for the purpose of constructing minor roads for the Forest Service, from the area claimed by appellant (R. 129–137, 141–144, 155, 162, 216). The Government, through contractors, improved the area by building over a thousand feet of roadway which parallels the gravel pit, by building a log loading ramp whereby a bulldozer would shove gravel up the ramp through a hole and load trucks by gravity (R. 146–147, 207, 218–219), and by removing a considerable amount of overburden (R. 159). The road was laid out so it would be accessible to the Forest Service in developing the gravel pit (R. 161). Whipple Creek was originally ten to fifteen feet wide. It was covered with trees, brush and windfalls. The gravel pit as developed, covers approximately 2.9 acres, extends 1600 feet, the entire length of appellant's claim and averages 80 to 100 feet in width. Holes twenty feet deep have been dug in the pit only to be refilled by action of the stream. The water of the creek has been directed from side to side in washing away the overburden and silt. The stream bed has been lowered fifteen feet (R. 141–146).

In 1949 and 1950, the Bureau of Public Roads made a survey to investigate the amount of gravel in this pit. It did a great deal of work in this area to prospect and prove that the material was there in sufficient quantity to justify setting it aside for a major project which was then planned. It was estimated there were about 300,000 cubic yards of

gravel in the pit. The project included the construction, improvement and maintenance of the North Tongass Highway, about six and one-half miles long, and surfacing it with crushed gravel and crushed gravel material for future pavement. As far back as 1950, it was planned for this project to include removal of gravel from the pit, which is a part of the area appellant claims.

In October 1950, the Bureau of Public Roads made the first formal request of the Forest Service that this gravel pit area be set aside for gravel purposes, and prepared a map showing the original 91.13 acres, the 37.5 acres and the gravel pit (R. 140, 252–253). By letter of January 31, 1951, the Bureau of Public Roads requested the Forest Service to set aside 37.5 acres of land, for the purpose of supplying road-building materials for construction and maintenance of forest highways and forest road development projects, for use of both the Bureau of Public Roads and the Forest Service (R. 4–6, 137–143, 178, 218). By Correction Memorandum No. 11, dated February 9, 1951, the 37.5-acre tract was so reserved by the Regional Forester (R. 4–5, 11–12, 138–139, 179–180, 270–271). Insofar as the Forest Service was concerned in regard to appropriating that area for use of the Bureau of Public Roads, that order was final (R. 270–272). However, following its custom, on February 7, 1951, the Chief Forester wrote a letter to the Forest Service, of the Department of Agriculture in Washington, requesting the withdrawal of the area, for the purpose of avoiding possible litigation in the future, and to protect it against unscrupulous mineral claimants (R. 5, 75, 181–185, 271–272). This was done by Public Land Order No.

734,[2] dated July 20, 1951, published July 26, 1951, in 16 Federal Register 7329 (R. 5, 76–77, 186).

On June 21, 1951, appellant posted a claim to about 20 acres which overlap the 37.5 acres of land here involved. He measured off the distance with a tape and compass, and upon completing boundary lines put a discovery post and stakes at the corners of his location. The discovery post is located at the upper end and a few feet over the boundary of the 37.5 acres withdrawn by the Government. He made a notice for location of a placer claim and filed it in the Recorder's Office (R. 6, 125, 147–148, 158, 296–302). On August 22, 1951, appellant erected barricades across the right-of-way constructed by the Government for ingress and egress, the only entrance to the gravel pit. He later placed a trailer house upon the area, removed timber and overburden, and mined and removed sand, gravel and stone, preventing the Government from obtaining gravel for the construction and maintenance of the highway, and requiring it to haul gravel a long distance for repair of the road (R. 6–9, 266, 280).

This is the only source from which the Bureau of Public Roads can get any material within the economic range, and it is going to have a continuous program there for years to come. It plans to construct three miles of forest development roads for the Forest Service, which will require approximately 15,000 cubic yards of gravel, and a road from Whipple Creek out to the end of the present

[2] An error appears in the printing of the order (Br. App. 48) in next to the last line of the second paragraph. It should read, "Forest Service, Department of Agriculture, and the Bureau of Land Management, Department of the Interior, as the Whipple Creek Public Service Site."

system for reconstruction, about four miles, which will require 75,000 cubic yards of gravel. The present project will require about 115,000 cubic yards (R. 174–177, 224–230, 249–253, 256–257, 263–269).

The specifications on the contract for the construction of the North Tongass Highway were received in the spring of 1951, and the money was appropriated for it on June 2, 1951 (R. 286). On July 20, 1951, the Bureau of Public Roads advertised for bids, and the contract was awarded to Manson-Osberg Company (R. 8, 228–229). At the time the contract was prepared, the local officials of the Bureau of Public Roads knew appellant had filed a mining location on the Whipple Creek area. However, it previously had been decided that gravel was to be taken from this pit, and the contract made it mandatory that the material was to be taken therefrom, since it is the only source of that quality of material within a reasonable haul of the project (R. 229–230, 237–240, 256–257).

This suit having been filed on October 3, 1951, an order granting a preliminary injunction was entered on October 15, 1951 (R. 12–14). After a trial, the court filed an opinion (R. 47–54, 103 F. Supp. 873) in which it held: that the Government was in actual use and possession of the area embracing the gravel pit and access road, had made valuable and permanent improvements therein, and it could not lawfully be included in a mineral location. It further held that the special use permit issued February 9, 1951 (Correction Memorandum No. 11), was sufficient to withdraw the land so that it was no longer open to entry or location under the mining laws; that the order of the Secretary of the Interior issued after appellant staked his claim related back to the request for withdrawal of

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February 9, 1951, and that appellant's claim is invalid. Findings of fact and conclusions of law to this effect were filed (R. 58–65), and a judgment was entered permanently enjoining appellant from using and occupying the land and mining and removing sand, gravel and stone therefrom (R. 66–69). This appeal followed (R. 69).

ARGUMENT

I

The area embraced in the gravel pit and access road in the actual use and possession of the Government could not be included in a location under the mining laws

In order that a locator may obtain a right to mining property by virtue of his location, it must be made upon the unappropriated lands of the United States. Here the Government's development, actual use and occupancy of the area constituted an appropriation or severance of the land from the public domain no less than if it had been done by Act of Congress or Executive Order. Appellant recognizes that such acts may remove the lands from operation of the mining laws (Br. 40), referring to actual occupation of any particular area and a marking upon the ground of some relatively permanent improvement. See *Scott* v. *Carew*, 196 U. S. 100 (1905),[3] and cases there cited.

The court found (Finding V) "That since 1934 plaintiff has used part of the tract bordering Whipple Creek as a source of sand and gravel in connection with the construction and maintenance of forest highways, roads and trails," and particularly described that use (R. 59–60).

[3] This decision makes clear the meaning of *United States* v. *Fitzgerald*, 15 Pet. 407 (1841), and *United States* v. *Tichenor*, 12 Fed. 415 (D. Ore., 1882), relied upon by appellant (Br. 40).

This finding is amply supported by evidence, as shown in the statement (pp. 3–4 *supra*). The Forest Service, the Bureau of Public Roads, and other governmental agencies, directly and through contractors, have used gravel from the area embracing the pit since 1934, for constructing and maintaining forest and public roads. The pit was developed and improvements were made by the Government for the sole purpose of providing a source of material for its use in administering the Tongass National Forest and the construction and maintenance of roads and highways. It cannot be presumed that this bounty was designed for the benefit of the appellant or any other individual at the sacrifice of the public interests.

Appellant attacks Conclusion of Law II (R. 63) that there was an appropriation and withdrawal of the road and three-acre area by actual use and possession as described in the findings (R. 38–39), on the ground that the United States was not in actual possession at the time of appellant's entry under the mining laws, but the finding and the evidence are both perfectly clear that the Government had been in actual possession of the designated area for several years, and had made improvements appropriate to the use to which the property was put. There is no merit to appellant's assertion that the roadway which had been bulldozed and the loading ramp which had been constructed, together with the removal of the overburden of trees, brush, windfalls and soil "are not the equivalent of permanent government improvements" (Br. 41). Cf. *Lyders* v. *Ickes*, 84 F. 2d 232, 234 (App. D. C. 1936), where it was assumed that the quarrying of rock from the island would have constituted an appropriation. As the Court stated in *United States* v. *Fullard-Leo*, 331 U. S.

256, 279 (1947), "The sufficiency of actual and open possession of property is to be judged in the light of its character and location." No further acts of possession could have been done by the Government to constitute possession of this gravel deposit in Alaska short of continuous operation of it, regardless of weather. The evidence is clear that the Government had every intention of using the material from this pit, and had no intention of abandoning it. In order to constitute abandonment of the right of possession, there must be shown a clear and unequivocal act showing a determination to surrender such right to the property. There must be the concurrence of intention to abandon and the actual relinquishment of the property. *Equitable Life A. S.* v. *Mercantile-Commerce B. & T. Co.*, 155 F. 2d 776, 780 (C. A. 8, 1946), certiorari denied 329 U. S. 760; *Helvering* v. *Jones*, 120 F. 2d 828, 830 (C. A. 8, 1941), certiorari denied 314 U. S. 661; *In re Stilwell*, 120 F. 2d 194, 195 (C. A. 2, 1941); *Ritter* v. *Lynch*, 123 Fed 930 (C. C. Nev. 1903).

Appellant's argument (Br. 38–41) based upon the fact that no work had been done for six months prior to his entry, ignores the evidence regarding the survey which had been made for the purpose of determining the amount of gravel which could be obtained for the construction of the North Tongass Highway and other projects which were being planned (R. 174, 224). It also ignores the evidence that the specifications on the contract for the construction of the highway were received in the spring of 1951, and the money therefor was received on June 2, 1951 (R. 286); and that in 1950 and 1951, the Bureau of Public Roads publicized the fact that it was going to build this road (R. 232–236). Appellant knew the

highway was to be constructed, and admitted that it was general knowledge that gravel for the highway was to be taken from the Whipple Creek gravel pit (R. 308–309). Furthermore, this six-month period, from December, 1950 to June, 1951, was the time of the year when very little work of this kind is done due to weather conditions, particularly since gravel washed down the stream to fill the holes which had been dug (R. 141, 160). Even under the mining laws (30 U. S. C. sec. 28, 48 U. S. C. sec. 381a), a locator of a mining claim is required to do only a limited amount of labor each year for the purpose of prospecting or developing the location pending the issuance of a patent.

Moreover, appellant made no discovery under the mining laws (30 U. S. C. sec. 21, et seq.)[4] but simply staked a claim to a valuable deposit of sand and gravel which had been discovered and developed by the Government (R. 298), the only source in a reasonable distance to town "that you can economically produce sand and gravel aggregates for Ketchikan" (R. 292). He first saw it in 1940 and it was tangled with brush, trees and underbrush. It has been cleared since then by the Government until "you can look up that stream, oh, about a thousand feet" (R. 302). Appellant testified that he has been in the back end of the creek many times, and "seeing these past operations in the year, there was no need for me to do any exploration work" (R. 296). Thus, by his own

[4] The mining laws of the United States have been extended to Alaska, 48 U. S. C. sec. 381, 381a. The opinion in *Cole* v. *Ralph*, 252 U. S. 286 (1920) contains, at pages 294–296, a general statement of the purpose and effect of the mining laws. Appellant's citation of this case (Br. 40) is to the paragraph summarizing the rights "in advance of discovery," and has no relevance to the present case where the discovery had been made long prior to appellant's attempted entry.

admissions, he has done nothing to develop this area, but has sought to take the results of the Government's development of this gravel pit while in its use and possession, which is contrary to the intent of the mining laws. *Gwillim* v. *Donnellan*, 115 U. S. 45 (1885); *Cole* v. *Ralph*, 252 U. S. 286 (1920). If the Government had been a private locator, appellant's entry clearly would have been invalid. Certainly the Government should be in no worse position in the use of its own property.

For these reasons, we submit that, under any view, the judgment of the court below so far as it relates to the road and the three acre area is clearly correct.

II

The 37.5 acre tract of land was officially reserved for the use of the Bureau of Public Roads and was not subject to location under the mining laws when appellant staked his claim

The reservation of this tract for use of the Bureau of Public Roads as a source of road building material is authorized by the Acts of March 4, 1915, c. 144, 38 Stat. 1100, as amended, 16 U. S. C. 492, and March 30, 1948, c. 162, 62 Stat. 100, 48 U. S. C. 341. Pursuant to these statutes, the Secretary of Agriculture issued Regulations U–10 and U–11 (R. 109–122) (36 C. F. R. 251.1, 251.2 (1949 ed.)), authorizing the issuance of "Special use permits." Correction Memorandum No. 11, which is in legal effect a special use permit, was issued by the Regional Forester, upon authorization delegated to him (R. 112–113). The withdrawal of the land was authorized under the above-mentioned acts and regulations and the name and form of the instrument of withdrawal are immaterial. No particular form is necessary for the withdrawal or reservation of public lands. It is sufficient if the announce-

ment thereof has such publicity as to accomplish the end to be attained.[5] *Wolsey* v. *Chapman*, 101 U. S. 755, 769–770 (1879); *United States* v. *Payne*, 8 Fed. 883, 888 (W. D. Ark. 1881); *United States* v. *Midwest Oil Co.*, 236 U. S. 459 (1915). The title to the land stood in the name of the United States and it remained in the United States. The effect of the instrument was to take the property out of the control of one and lodge it in the control of another set of government officials, while the title remained in the same status as it had been before. *Gibbs* v. *United States*, 150 F. 2d 504, 508 (C. A. 4, 1945), certiorari denied 326 U. S. 771.

Appellant argues at length (Br. 25–35) that Correction Memorandum No. 11 was not a special use permit under 48 U. S. C. sec. 341 primarily on the ground that if it was Public Land Order 734 would have been unnecessary. The court referred to it as a special use permit throughout its opinion and correctly held that it was sufficient to make the withdrawal (R. 50–54). The only necessity for the issuing of Public Land Order 734 was to make the withdrawal of the area perpetual for the use of the Bureau of Public Roads, since sec. 341 gives the Secretary of Agriculture power to permit the use and occupancy of national forest lands in Alaska for a period not exceeding thirty

[5] Appellant's argument (Br. 35–37) that the Government did not rely upon 48 U. S. C. 341 as the basis for Correction Memorandum No. 11 is irrelevant here, since it has no tendency to show that the statute does not constitute authority for the action taken. It should be noted that in Government's Exhibit 2, Regulations U–10 and U–11 (R. 110–122) specifically refer to the Act of March 30, 1948, 62 Stat. 100. Appellant made no objection to the admission in evidence of the regulations which cite the statute (R. 98–99, 108–109). The amendment to paragraph IV of the complaint, mentioned by appellant (Br. 36), has no bearing on the present question, which relates to the separate ground of the complaint asserted in paragraph V (R. 4).

years. The material will be needed by the Government as long as it maintains public and forest roads in this vicinity. This source is constantly replenished by high water washing material down the stream and filling up the holes where gravel is removed (R. 138–141). Since the Secretary of the Interior has exclusive jurisdiction to pass upon mineral claims in all public lands, it was sound business practice for the Secretary of Agriculture, or his representative, in order to apprise the Secretary of the Interior that the land was withdrawn under sec. 341, to request that he formally withdraw it from the operation of the mining laws.[6] The lower court correctly held that this withdrawal by the Secretary of the Interior was a confirmation of the withdrawal as of the date of Correction Memorandum No. 11, or related back to that date. Any view that this special use permit alone was insufficient to withdraw the tract from location under the mining law as argued by appellant runs contrary to the express provision of sec. 341. That withdrawal was fixed by law, and no officer of the United States, either through a misconception by him of the legal effect of that withdrawal or by securing a further confirmation of the withdrawal by the Secretary of the Interior, can lessen in any degree the legal effect of the first withdrawal. Moreover the intention that Correction Memorandum No. 11 should be a definitive act and not merely a preliminary step to issuance of the Public Land Order is clear from the fact it

[6] Another apparent reason for the issuance of the order, as shown by Circular No. U–220 (R. 78–82), was to remove all doubt that areas needed for public use were protected against subsequent mineral location. This circular applies to the Forest Service generally, but the statutes here involved (p. 2, *infra*) apply only to Alaska.

stated that the tract "is hereby reserved" and two days after its execution it was placed in the land records of the Tongass National Forest (R. 11, 182–185).

There is nothing inconsistent in the application for Public Land Order 734 and the permit and order, as contended by appellant (Br. 26–28), because the permit could be for only thirty years, and this type of use could not interfere with an oil and gas lease. It is just good business and the usual practice to get the increased revenue if any can be had from any Government properties. By securing the Public Land Order the Bureau of Public Roads has a permanent withdrawal instead of a thirty year withdrawal and different conditions which would be to the advantage of the Government. Appellant's argument that by withdrawing the lands from the operation of the public land laws, including the mining laws, "but not the mineral leasing laws," the Secretary of the Interior gave the Secretary of Agriculture less than he had requested, and his assertion that, if the land is subject to the mineral leasing laws, appellant could obtain a lease of the sand and gravel deposit, even if his mining claim should be set aside (Br. 27–28), are based on the erroneous assumption that a sand and gravel lease might be obtained under the mineral leasing laws. On the contrary, those laws apply only to "deposits of coal, phosphate, sodium, potassium, oil, oil shale, or gas." The Act of Feb. 25, 1920, c. 85, sec. 1, 41 Stat. 437, as amended, 30 U. S. C. 181.

Appellant's argument (Br. 29–32) that the Secretary of Agriculture had no power to issue permits for development of mineral resources prior to the enactment of 48 U. S. C. sec. 341, ignores the authority vested in him by 16

U. S. C. sec. 492, "to permit the taking of earth, stone, and timber from the national forests for the construction of Government railways and other Government works in Alaska." His assertion that the Government is developing "a mine," and his argument based thereon relating to the general development of mineral resources that may exist in national forests, is beside the point here. The present case represents simply the use of sand and gravel for road building purposes, and not the general exploitation of mineral resources that may exist in national forests.[7]

The cases relied upon by appellant do not sustain his contention that the 37.5 acre tract of land was not appropriated until Public Land Order 734 was published in the Federal Register (Br. 16–25), since there was no such withdrawal of land under a statutory authority in those cases as exists in the present case. His argument (Br. 21) based upon the language in Regulation U–3, (R. 92) to the effect that the withdrawal would not be effective until published in Federal Register is immaterial here, since that

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[7] We are not relying, as appellant contends (Br. 37–38), on the Act of Nov. 9, 1921, c. 119, sec. 17, 42 Stat. 216, 23 U. S. C. 18, as an independent ground for authorization in the instant case. That statute, which authorizes the transfer of lands "as a source of materials for the construction or maintenance of" highways, is certainly indicative of the congressional policy that road materials should be made available to governmental organizations which are constructing highways in the vicinity of public lands or reservations of the United States.

regulation is addressed only to withdrawals for recreation areas, not withdrawals for use of road materials.[8]

CONCLUSION

For the foregoing reasons it is respectfully submitted that the judgment of the district court should be affirmed.

J. EDWARD WILLIAMS,
Acting Assistant Attorney General,
P. J. GILMORE, Jr.,
United States Attorney,
Juneau, Alaska.
ROGER P. MARQUIS,
ELIZABETH DUDLEY,
Attorneys, Department of Justice,
Washington, D. C.

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[8] The court did not base his decision on the theory urged in paragraph IV of the complaint (R. 4) of a withdrawal of 91.13 acres of land as a public service site. The regulations and rulings which were excluded by the trial court (Br. 42–45) are in fact printed in the record (R. 75–93) but do not help appellant for the reasons already stated herein.

U. S. GOVERNMENT PRINTING OFFICE: 1953